For discussion
on 25 January 2011

Bills Committee on
Competition Bill

Responses to Follow-up Questions
Arising From the Meeting on 17 January 2011

Purpose

This paper responds to questions raised by Members at the meeting on 17 January 2010.

"De minimis" approach

2. International best practices indicate that the "de minimis" arrangements of competition law enforcement, such as the market share threshold, are commonly set out in the guidelines or regulations rather than in the principal legislation. These guidelines and regulations are usually issued or made by the enforcement authorities after enactment of the competition law. Whilst stipulating in the principal legislation the details of "de minimis" arrangements may help enhance legal certainty and clarity, this would curtail the ability of the future competition authority to react quickly to changing market landscapes. This is undesirable as it will adversely affect the effective enforcement of the competition law.

3. We consider it more appropriate to allow for the necessary flexibility by not prescribing the "de minimis" arrangement in the principal Ordinance. During the transitional period between the enactment of the new law and the coming into force of the competition rules, the future Competition Commission (Commission) will consult the public, draw up its regulatory guidelines covering a "de minimis" approach that best fits Hong Kong's actual needs, and publicize the implementation details of the law. The business sector will likewise be consulted and fully briefed on the "de minimis" approach by the Commission.

Pecuniary penalty rule

4. As explained in the discussion paper (CB(1)637/10-11(02)), the legal maximum of pecuniary penalty applicable to competition law enforcement by the European Commission (EC) is 10% of the total worldwide turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement. That said, according to the new guidelines on the method of setting fines published by EC in 2006, calculation of fines starts with the derivation of a "basic amount" of the fine having regard to the value of firm's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area during the last full business year. The gravity and duration of the infringement will also be considered in arriving at the final amount. If the fine so calculated exceeds the legal maximum, i.e. 10% of worldwide turnover, the EC will reduce the fine to that level.

Stand-alone right of action

5. We note some stakeholders' concern that allowing stand-alone rights of action may give rise to frivolous complaints to the detriment of the local business operators. Such concern, however, is not substantiated by international experience, not to mention that the future Competition Tribunal (the Tribunal) or the Court of First Instance will be able to strike out vexatious and frivolous lawsuits at the early stage of litigation. Furthermore, access to justice by way of private action is a fundamental right which should not be easily denied without good justification. Many competition regimes provide stand-alone private rights of action as the option of a "self help" remedy to business and customers who consider themselves the victims of anti-competitive conduct. Indeed, the European Commission and the UK's Office of Fair Trading are exploring how to remove roadblocks to greater use of private rights of action. We are prepared to listen to the views of Members and the justifications for removing it from the Bill.

Complaints received by the Competition Policy Advisory Group (COMPAG)

6. The COMPAG has since its establishment in 1997 received 118 complaints on alleged anti-competitive practices and the abuse of market power in various economic sectors. Details of all complaints have been summarized in the Annual Reports of COMPAG as available on its

official website (www.compag.gov.hk). Although many of these complaints were not substantiated or established, this should be viewed against the background of the lack of relevant legislation for effective investigations to be conducted into the alleged anti-competitive cases. **Appendix I** contains brief description on a few relevant COMPAG cases.

Interpretation of "market"

7. Market definition is important for competition analysis, but it is essentially an economic test and has to be dealt with specifically on a case-by-case basis. In brief, the objective of defining a market in both its product and geographic dimension is to identify the actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. In addition, a relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. It is worth noting that the concept of relevant market is different from other definitions of market often used in other contexts, for instance, a specific area where several retailers sell their products or the economic sector to which those firms belong etc.

8. Demand substitutability and supply substitutability are the two sources of competitive constraints that will be taken into account in defining a relevant market. Overseas competition regulatory authorities have already accumulated useful experience on the theoretical considerations and practical procedures when defining a relevant market. On assessment of demand substitutability, the question is whether the customers of the undertakings involved would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such

that small, permanent increases in relative prices would be profitable. As regards supply substitutability, the question is whether, in response to a small and permanent change in the relative price of a particular product, other suppliers that do not currently supply the product in question may be able to supply it at short notice without incurring significant switching cost. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the undertakings involved and such supply substitution should therefore be taken into account in defining the relevant market.

9. We need more time to review the past competition cases in other jurisdictions and select those relevant to illustrate the underlying rationale and practical procedures in respect of market definition. We will provide such case law examples for Members' reference in a separate submission.

Questions raised by the Hon LEUNG Kwok-hung

(a) Object of the Bill

10. We remain of the view that the current long title of the Bill already completely and adequately describes the objects of the Bill contained in the substantive clauses. To this end, we consider it not necessary to have a provision repeating those objects or to have a provision providing for any other objects. Moreover, the phrase recommended by the Hon LEUNG, i.e. to enhance economic efficiency and the free flow of trade through promoting sustainable competition, thereby bringing benefits to both the business sector and consumers" is indeed the stated objective of the Administration's competition policy, which is applicable regardless of whether there is a proposed cross-sector competition law. It is therefore not necessary and particularly meaningful to stipulate this pre-existing objective as one of the objects of the Bill.

11. We note the Hon LEUNG's another suggestion, i.e. stipulating the recommended phrase as a new function of the Commission under clause 129. We may further consider this point at the Bills Committee during the clause-by-clause examination stage.

(b) General exclusion on economic benefit grounds in section 1(a)(ii) of Schedule 1

12. As mentioned in our earlier replies (CB(1)847/10-11(01) and CB(1)1034/10-11(03)), we consider that section 1 of Schedule 1 as currently proposed already suffices to capture the rationale of granting exclusion on economic benefit grounds. We are particularly concerned that adding the phrase "allowing consumers a fair share of the resulting benefit" into this section will introduce uncertainties for the business sector, especially SMEs, in their self-assessment under the general exclusion mechanism.

(c) Appointment of representatives of small and medium enterprises (SMEs) as Commission members

13. We have explained in our preceding reply (CB(1)1034/10-11(03)) that it remains our policy intention to appoint people with expertise and experience in SMEs as Commission members, so as to allow the future Commission to better take into account the views and concerns of local SMEs while enforcing the new law, thereby facilitating compliance by SMEs. We consider the present formulation in section 2(2) of Schedule 5 of the Bill strikes a good balance between reflecting our policy intention as well as the need for sufficient flexibility under the appointment mechanism.

Questions raised by the Hon Mrs Regina IP LAU Suk-yee

(a) Maximum pecuniary penalties

14. As we need more time to review and ascertain the maximum pecuniary penalties adopted by the competition laws of each of the G-20 economies, we are only able to provide in **Appendix II** the requested information in respect of a number of the G-20 jurisdictions as well as Singapore. We will try to provide the other relevant information for reference in a separate submission.

(b) Enforcement outside Hong Kong

15. According to legal advice, as long as the judgments given by the future Competition Tribunal fall within the scope of the current arrangement on reciprocal enforcement of judgments, they may be enforced in a number of foreign jurisdictions, including Australia, New

Zealand, Belgium, Germany, Israel, France, Italy, India, Malaysia and Singapore. The enforcement of the HKSAR judgments with the above jurisdictions is not based on any agreement signed with them but is based on the respective legislation providing for reciprocal enforcement of judgments and are therefore subject to the relevant legislation in the respective jurisdictions.

Advice sought

16. Members are invited to note the contents of the paper.

Commerce and Economic Development Bureau
January 2011

Appendix I

Selected complaints received by COMPAG since its establishment in 1997

Case description	Economic Sector
Introduction of Emergency Bunker Surcharge by Shipping Lines In June 2008, an industry association sent the COMPAG Secretariat its press release and circular to members complaining about the collection of an Emergency Bunker Surcharge ("EBS") with respect to Taiwan-Hong Kong/South China trade by eight shipping lines. According to the association, these eight shipping lines together accounted for almost 100% of the Taiwan-Hong Kong/South China service. The association alleged that the imposition of the EBS was a collective act of the eight shipping lines and was an anti-competitive agreement. The case was referred to the Transport and Housing Bureau (THB) for investigation, which found, amongst other things, that - (a) all the eight shipping lines did not admit that there was any prior discussion and there is no conclusive evidence that could prove otherwise; and (b) five out of the eight shipping lines withdrew the EBS before its launch or changed their targeted payees from Hong Kong consignees to the party responsible for freight. This materially changes the EBS proposal. Also the three remaining shipping lines subsequently withdrew the EBS and some, as THB gathered through industry association contact, even refunded the EBS collected. In the light of the above assessment, COMPAG considered that the complaint was not substantiated.	Logistic

Case description	Economic Sector
Supply of Bituminous Materials for Highways Department Maintenance Term Contracts In December 2006, the Highways Department (Highways) received an anonymous written complaint alleging collusion among the four approved suppliers of bituminous materials, in respect of two Highways maintenance term contracts that were at the time open to tender. The complainant alleged that two of the approved suppliers had been "designated" as the suppliers for the two maintenance contracts. Each "designated" supplier would offer bituminous materials to potential tenderers for the respective contract at a reasonable price (albeit at a price higher than the current market level), whereas the other three suppliers would either decline to offer materials, or would offer materials at a price 10% higher than that of the "designated" supplier. The complainant further requested Highways to delete a requirement that tenderers should submit a letter of undertaking from an approved supplier of bituminous materials, so as to avoid "tying" tenderers to certain suppliers. Having checked the allegations made in the complaint against the available information, Highways considered that there was no firm evidence corroborating the allegation. However, the possibility of collusion between the approved suppliers cannot be entirely ruled out. As to the binding of tenderers into pre-bid agreements for the supply of materials, Highways have reviewed the need for undertakings that bind the tenderer and the supplier, and have decided to dispense with these in future term contracts. This would help eliminate the possibility of suppliers binding tenderers into pre-bid agreements for the supply of bituminous materials. However, Highways will still require the submission of the sub-contractor's warranty after the award of the contract to the successful tenderer. In the light of the above assessment, COMPAG considered that **the complaint was not substantiated**.	Construction

Case description	Economic Sector
Alleged anti-competitive conduct by a supermarket In August 2006, a supplier (the Supplier) lodged a complaint that a supermarket (the Supermarket) had engaged in anti-competitive conduct. Specifically, the Supplier claimed that – (a) the Supermarket had unilaterally raised the retail price of the Supplier's products above an agreed level; and (b) after displaying the Supplier's products for only a few months, the Supermarket had removed them from its shelves upon the launch of similar products under its own brand name, despite the Supermarket's earlier indication that the fee paid by the Supplier covered a one-year period. COMPAG referred the case to the then Commerce, Industry and Technology Bureau (which has become the Commerce and Economic Development Bureau after re-organisation on 1 July 2007), which commissioned the Consumer Council ("the Council") to investigate the complaint. The Council examined the complaint with reference to its previous studies on the supermarket sector, relevant overseas experience and the guidelines set out in the Government's Statement on Competition Policy. However, the Council encountered difficulties in examining the complaint thoroughly due to the limited information provided by the Supplier. Furthermore, it could not interview the Supermarket to assess the reason behind the practices without exposing the complainant's identity. As a result, the Council was unable to approach the supermarket for verification of the allegations made by the complainant. No evidence was found that the Supermarket placed impediments on the complainant, which could prevent it from supplying to other outlets, or for the purpose of substantially lessening competition. It could not be concluded that the Supermarket's behaviour amounted to anti-competitive conduct that has the effect of limiting market	Retailing

Case description	Economic Sector
accessibility or contestability and impairing economic efficiency.	
Complaint against two local Wedding Expo Organisers In February 2006, a Taiwan-based wedding photography company registered in Hong Kong made a complaint to the COMPAG Secretariat that two wedding expo organizers had refused to allow it to participate in exhibitions held at the Hong Kong Convention and Exhibition Centre (HKCEC) in 2005 and early 2006 under pressure from other wedding photography companies. It also alleged that the organisers had restricted participating companies from promoting wedding photography services offered in Taiwan and the Mainland. The then CITB investigated these complaints, but found **no conclusive evidence that the conduct of the two wedding expo organizers amounted to anti-competitive behaviour** that had the effect of limiting access to and contestability in the wedding services market. It further noted that the complainant had participated in wedding expos in late 2006. However, CITB considered that the criteria used by the two wedding expo organisers in selecting exhibitors lacked transparency, and drew their attention to the Statement on Competition Policy.	Professional service (exhibition)

Appendix II

Maximum pecuniary penalties under the competition laws of selected jurisdictions

I. Based on the turnover of the undertaking's global operation

Jurisdiction	Maximum pecuniary penalty as % of turnover
China	10% of turnover in the preceding business year
European Union	
France	
Germany	
Italy	
United Kingdom*	

II. Based on the turnover of the undertaking's local operation

Jurisdiction	Maximum pecuniary as % of turnover
Australia*	The greater of A$10,000,000, three times the value of the benefits of the infringing conduct or 10% of annual Group turnover, excluding intra-Group transfers and supplies not connected with Australia.
Singapore	10% of turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years.
South Korea*	3% of turnover specified by the Presidential Decree for abuse of dominance. In the case of an absence of turnover, or in the case of difficulty in computing the turnover pursuant to the Presidential Decree, however, surcharges of not more than KRW 1 billion may be imposed.

Note:

(*) These competition regimes also provide for criminal sanctions for directors and company officials for cartel behaviour.

III. Other arrangement

Jurisdiction	Brief description
Canada	For offences such as price fixing, undertakings are liable to conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding C$25 million or both.
Japan	For breaches amounting to unreasonable restraint of trade, criminal penalties including fines of up to 500 million yen for a corporation and imprisonment of up to five years and a fine of up to 5 million yen or both for an individual.
United States	For cartel offences, the maximum fines for corporations and individual are US$100 million and US$1 million respectively. As an alternative, the court has discretion to impose fines up to twice the total gain to the conspirators or twice the loss to victims – whichever is greater. In addition, or alternatively, individuals may be subject to a term of imprisonment of up to 10 years.